SUPREME COURT, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1184.

MARY DOMANY and ANDREW DOMANY,

Petitioners,

vs.

OTIS ELEVATOR COMPANY and
SEARS, ROEBUCK & COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT OTIS ELEVATOR COMPANY IN OPPOSITION.

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April 19, 1967.

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This is a tort case brought at common law to recover money damages for personal injury and loss of consortium. Petitioners have asked review of the judgments of the United States Court of Appeals for the Sixth Circuit ruling on a question of sufficiency of evidence under local law.

QUESTION PRESENTED.

The single question here involved is: Whether the District Court's erroneous refusal to submit to the jury the pleaded and proven issue of Petitioner's contributory negligence entitles Respondent to a new trial.

STATEMENT OF CASE.

Mary Domany, a shopper in Sears, Roebuck & Co. store in Maple Heights, Ohio was riding an escalator when it stopped and she fell. She sued for damages naming as defendants Sears, Roebuck & Co. and Otis Elevator Company, the latter being a concern which serviced the escalator. Andrew Domany brought a derivative action against the same defendants claiming damages for loss of consortium and the suits were consolidated for trial.

While the complaint had charged Respondent with negligence, no evidence was introduced of any defect in, or failure of, any part of the entire escalator mechanism to account for the stopping. Nevertheless, the trial court submitted the case to the jury against Respondent on the doctrine of *res ipsa loquitur*. From the beginning, Respondent's answer had pleaded the defense of contributory negligence. Substantial evidence was offered on this issue. The testimony of many witnesses established facts from which reasonable minds might conclude that Mrs. Domany was not holding the handrail either effectively or at all when the escalator stopped. Nevertheless, when submitting the case to the jury, the Court erroneously refused to charge on the issue of contributory negligence and compounded the error by affirmatively directing the jury that Mary Domany was not herself guilty of any negligence. In the absence of the vital defense of contributory negligence, verdicts were returned in favor of Petitioners upon which judgments were entered.

On review, the Court of Appeals unanimously found sufficient evidence supporting the issue of contributory negligence and ruled that the defense should have been submitted to the jury. It reversed and remanded the cases for a new trial.

ARGUMENT.

I. NO BASIS FOR GRANT OF CERTIORARI IS SHOWN.

Jurisdiction is invoked on the basis of diversity of citizenship. 28 U. S. C. 1332 (a). The substantive law of Ohio is applicable. Neither Constitutional provisions, Federal laws nor state statutes are here involved. Additionally, conflicting decisions between Courts of Appeals or conflict with decisions of this Court are not even claimed. The Court of Appeals simply applied settled principles of common law to a question of sufficiency of evidence and did so correctly. The case does not commend itself for review in this Court.

II. DECISION BELOW IS RIGHT.

1. Decision Is in Accord With Long-Settled Law.

Contributory negligence is a complete defense to action grounded in negligence. *Johnson v. Bank* (1950), 152 Ohio St. 477, 478; 90 N. E. (2d) 145:

> "Ohio follows the fundamental common-law rule that in an ordinary tort action the injured plaintiff may not recover * * * if * * * guilty of negligence proximately contributing to cause his own injury."

From the outset of this action, the issue of Mary Domany's contributory negligence was squarely in the case and was just as important as the issue of Respondent's alleged negligence, the latter being the gravamen of the complaint.

Respondent's answer affirmatively alleged contributory negligence. The Court of Appeals unanimously found ample evidence was introduced from which reasonable minds might conclude that Mary Domany was contributorily negligent.

Despite sufficient evidence supporting Respondent's defense, the trial court not only erroneously denied Respondent a charge on contributory negligence, which charge had been requested in writing, but over objection affirmatively directed a finding against Respondent on the issue. It did so in disregard of the fundamental, settled law to the contrary. *Botto, et al. v. Fischesser* (1963), 174 Ohio St. 322, 189 N. E. 2d 127; *Durham v. The Warner Elevator Manufacturing Co.* (1956), 166 Ohio St. 31, 139 N. E. 2d 10; *Hilleary v. Bromley, et al.* (1946), 146 Ohio St. 212, 64 N. E. 2d 832; *Lytle v. Boyer* (1878), 33 Ohio St. 506.

In consequence of the error, the cases were remanded for a new trial, the Court of Appeals saying in its opinion, 369 F. 2d 604, 608 (Petitioners' appendix pp. 35 and 36):

> "It is a fundamental rule of our jury system that where there is a question as to the existence of certain alleged facts, the function of determining such facts rests with the jury and not the Court."
>
> "The district judge was in error in failing to submit the issue of contributory negligence of the plaintiff, Mary Domany, to the jury."

III. NO CONSTITUTIONAL QUESTION INVOLVED.

Nothing here suggests any legitimate Constitutional question. Petitioners claim their right to a jury trial under Seventh Amendment of the United States Constitution has been invaded by the reversal below. This astonishing proposition appears for the first time in the instant petition. Petitioners' argument is not advanced by applying such phrases as the Court's "reasoning is absurd" or "not a shred of evidence," particularly in light of the Court of Appeals unanimous finding to the contrary. What Peti-

tioners ask, in the last analysis, is that this Court weigh and decide the evidence; a function which in Ohio, as indeed under the Seventh Amendment, is reserved to the jury. In truth, Respondent—not petitioners—was denied the right to trial by jury on its defense. The Court of Appeals rectified the error and remanded the cases for retrial with instructions to permit the jury to determine the issue improperly withdrawn from it in the first trial. This accords justice to all parties.

Petitioners' claim of a question under Article IV, Section 1 of the Constitution is without either legal or evidentiary support. First, the point regarding Andrew Domany's marital status dealt with the requirements of proving a valid divorce, not marriage. Never in the remotest sense did anyone, least of all the Court of Appeals, fail to grant full faith and credit to any "public acts, records or judicial proceedings" of Indiana. No written record of any Indiana proceeding was even offered in evidence. Moreover, the point was not the ground of reversal nor did it result in any final judgment being awarded.

No amount of changing or regrouping of facts can extract a Constitutional question from this record.

CONCLUSION.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SUMNER CANARY,
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Attorneys for Respondent Otis Elevator Company.

April 19, 1967.